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no amount of casuistry can make it anything but a contract." Though the correctness of the first part of this statement in the light of the decisions enumerated is doubtful, it is submitted that the latter part is a correct exposition of what the law should be.

J. W. L.

TRUSTS—ERECTION OF MONUMENT AS A CHARITY—In determining the validity of testamentary provisions for the erection of monuments or for the care and maintenance of tombs and burial grounds, there are two important considerations to be noted: first, does the provision authorize or direct an immediate expenditure; second, does it provide for continued care and maintenance.

It would seem that such a bequest does not constitute a public charity, although generally considered under that branch of the law. Just what is a public charity is not determinable by any well defined rule, but since the Statute of 43 Elizabeth¹ the enumeration of classes therein contained are indicative of the lines within which a gift must fall in order to be upheld as a charity by the court. Or, as has been stated by a modern jurist, "Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from taint or stain of every consideration that is personal, private or selfish, is a gift for charitable uses."² It is clear that a gift for the erection of a monument is not a gift for a charitable use within the rule stated³ and the court was justified in so holding in the recent case of the *Morristown Trust Company v. Mayor of Morristown*.⁴ In that case, a legacy of five thousand dollars was appropriated for the erection of a bronze and granite base for the flagstaff in the Morristown Park when the proper consent should be obtained for its erection from the trustees of the park and the municipal authorities of the town; and there was a provision that it was to bear an inscription that it was erected to the memory of the testator's father.

But although a gift for the erection of a monument is not for a charitable use, neither is it open to the objection that it creates a perpetuity, where it provides for the immediate expenditure of the bequest, and it has been frequently held that such a bequest or direction in a will is valid.⁵ "To hold otherwise would be to deny the right of the testator to dispose of his estate."⁶ It is not necessary

¹ Stat. 43 Eliz., c. 4 (1601).

² Binney, J., in *Price v. Maxwell*, 28 Pa. 25 (1857).

³ Trimmer v. Danby, 25 L. J. Ch. N. S. 424 (1856).

⁴ 91 Atl. Rep. 736 (N. J. 1914).

⁵ *Detwiller v. Hartman*, 37 N. J. Eq. 347 (1883); *Bainbridge's Appeal*, 97 Pa. 482 (1881); *McIvain v. Hockaday*, 36 Tex. Civ. App. 1 (1904).

⁶ *Detwiller v. Hartman*, *supra*, n. 5.

that the monument be to the memory of the testator. It is a good gift if to the memory of the testator's parents;⁷ or to the memory of certain distinguished men.⁸ A bequest for the purchase of a burial lot and fence therefor is analogous to a gift for the erection of a monument and has been so held.⁹ Such gifts stand on the same footing as an expensive funeral.¹⁰

But where, under our second consideration, the testamentary provision creates a perpetual trust for the preservation and maintenance of the graves or monuments of the testator or other named persons, it is void as being repugnant to the Rule against Perpetuities.¹¹ Such a gift, to be valid, must be of such a nature that it can be upheld as a charitable use, and that this may be possible the general public, and not merely individuals, must have an advantage in it. Just what is sufficient to make the gift one for a charitable use is not clear, but it seems well established at common law that a provision for a trust for the purpose of keeping a private burial lot in repair is not made a charity by a direction that any surplus shall be applied to the general maintenance of the cemetery,¹² or other charitable use.¹³ By statute in many states, however, it is provided that gifts for the care and maintenance of graves, cemeteries and churchyards shall not fall by reason of being made in perpetuity, but shall be held to be made for a charitable use.¹⁴ Such acts are of course valid.¹⁵

A distinction is made between a bequest in trust to apply the income for the benefit of a churchyard as a whole, and one for the maintenance of a particular grave or graves therein. A gift of the former kind is almost universally held to be a charitable gift,¹⁶ and this even though the gift be for the upkeep of a family burying ground.¹⁷

⁷ *Masters v. Masters*, 1 P. Wms. 423 (1717); *Fite v. Beasley*, 12 Lea, 328 (1891).

⁸ *Gilmer v. Gilmer*, 42 Ala. 9 (1868).

⁹ *Detwiller v. Hartman*, *supra*, n. 5; *Fite v. Beasley*, *supra*, n. 7.

¹⁰ *Mellick v. The Asylum*, Jacob. 180, 23 Rev. Rep. 21 (Eng. 1821).

¹¹ *Sherman v. Baker*, 20 R. I. 446 (1898); *Hilliard v. Parker*, 76 N. J. Eq. 447 (1909); *Bates v. Bates*, 134 Mass. 110 (1883); *Re Davitt*, 188 N. Y. 567 (1907).

¹² *Hilliard v. Parker*, *supra*, n. 11; *M. E. Church v. Gifford*, 5 Pa. C. C. 92 (1888).

¹³ *Coit v. Comstock*, 51 Conn. 352 (1883).

¹⁴ Penna. Act of May 26, 1891, P. L. 119; N. J. Act of 1878; N. Y., C. 198 of Laws of 1884; Mass. Pub. Stat., chap. 116, §36.

¹⁵ *Nauman v. Weidman*, 182 Pa. 263 (1897); *Moore v. Moore*, 50 N. J. Eq. 554 (1892); *First Pres. Church v. McKallor*, 35 App. Div. 98 (N. Y. 1898); *Re Bartlett*, 163 Mass. 509 (1895).

¹⁶ *Re Vaughan*, 33 Ch. Div. 187 (Eng. 1886); *Hopkins v. Grimshaw*, 165 U. S. 342 (1897).

¹⁷ *Swasey v. Amer. Bible Soc.*, 57 Me. 523 (1869).

There is a middle class of cases where the bequest is for the erection and perpetual upkeep of a monument to the testator or certain designated individuals, but is so tied up with a public benefit that the whole bequest will be upheld as a charitable use. Such cases must be decided on their facts and whether or not such a gift will be held valid will be largely determined by the benefit that will accrue to the public thereby.¹⁸ Within this class the recent New Jersey case seems to fall and the court, considering the purpose of the bequest, was clearly justified in holding that it was not for a charitable use. Notwithstanding this, the gift might have been upheld had it provided for the immediate erection of a monument in memory of the testator's father. The gift, however, was to take effect "when the proper consent should be obtained for the erection of the monument from the trustees of the park and the municipal authorities." It is clear that such consent might never be secured and the gift was therefore void as repugnant to the Rule against Perpetuities.

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¹⁸ In *Smith's Estate*, 181 Pa. 109 (1897), a testamentary provision for the erection of a memorial monument or arch in Fairmount Park, Philadelphia, and the construction of a children's playhouse and grounds, and for the preservation and maintenance thereof forever, was held to be for a charitable use on the ground that the monument would serve to keep alive the spirit of patriotism and remembrance of the deeds of distinguished Civil War veterans whose statues were directed to be placed thereon, notwithstanding the fact that the testator directed to be placed upon the main column a bronze statue of himself, with his name underneath in large letters, and that the buildings to be erected should contain a memorial tablet. But *cf.* *McCaig v. Glasgow University* (1907), Sess. Cas. 231, where a testator directed the income of his heritable estate to be made a perpetual trust for the purpose of erecting—first, statues of himself and other members of his family, and secondly, artistic towers on his estate, declaring that his wish was to encourage rising young artists, and for that purpose prizes were to be given for the best plans for the proposed statues and towers, it was held that the public in general would not be benefited, and for that reason the use was not charitable and therefore void.